

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of ANNE E. BURY and JOSHUA B.
BURY, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

ERNEST A. BURY,

Respondent-Appellant,

and

THAIS BURY,

Respondent.

In the Matter of ANNE E. BURY and JOSHUA B.
BURY, Minors.

DEPARTMENT OF HUMAN SERVICES, f/k/a
FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

THAIS BURY,

Respondent-Appellant,

and

UNPUBLISHED
June 13, 2006

No. 266926
Wayne Circuit Court
Family Division
LC No. 03-422513-NA

No. 266927
Wayne Circuit Court
Family Division
LC No. 03-422513-NA

ERNEST A. BURY,

Respondent.

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

In these consolidated appeals, respondents appeal as of right from the trial court order terminating their parental rights to the two minor children pursuant to MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).¹ We affirm.

Both respondents challenge the sufficiency of the evidence for termination of their parental rights. The trial court did not clearly err by finding at least one statutory ground for termination of respondents' parental rights was established by clear and convincing evidence. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

The conditions leading to adjudication were inadequate housing, domestic violence, and respondent mother's mental illness, and these conditions continued to exist more than two years after the initial dispositional order was entered in this matter. Respondent mother never demonstrated that she had obtained adequate housing; respondent father obtained housing, yet failed to maintain it in a condition suitable for the children. At the time of trial his residence lacked a working stove and was maintained in an unsanitary condition with grease on the counters and moldy food in the refrigerator. The evidence also indicated that respondent father continued to exhibit difficulties with anger management throughout these proceedings. He behaved explosively with workers and with the children's caregiver on several occasions. In November 2004 respondent father became very irate with the children's caregiver and she became fearful that he would become violent. Most recently, in April 2005, respondent father invoked the spirit of Mary against a worker, while pacing, perspiring, and shaking, only one or two feet from the worker. Although respondent father engaged in individual counseling and completed counseling addressing domestic violence, he exhibited a troubling lack of insight at trial when he testified that he did not really think he had become upset in the April 2005 incident. This evidence adequately supports the conclusion that the condition underlying the initial domestic violence problem, i.e., anger management, continued to exist, such that the trial court did not clearly err by finding that the adjudicative condition of domestic violence continued to exist. Finally, although respondent mother was engaging in treatment for her mental health condition at the time of trial, her bipolar disorder was only in partial remission by the most recent report, and respondent mother exhibited superficial insight, attempted to avoid and rationalize things, and was never able to work to her potential, but was living on food stamps despite having a degree from Wayne State University. Thus it appears that her mental health condition, even at

¹ The trial court relied upon MCL 712A.19b(3)(c)(i) and (j) with respect to both respondents. MCL 712A.19b(3)(c)(ii) was applied only to respondent father, and MCL 712A.19b(3)(g) was applied only to respondent mother.

the time of trial, persisted to the extent that it would substantially impair her ability to care for the children.

The trial court did not clearly err by finding no reasonable likelihood that the conditions of adjudication would be rectified within a reasonable time. MCL 712A.19b(3)(c)(i). Given respondent father's failure to bring his apartment to a suitable condition for the children in the 14 months he lived there, it appears unlikely that his ability to do so will improve in the foreseeable future. Although it is clear that respondent father made substantial effort at self-improvement, the record also reveals that his progress has been slow. After two years the foster care worker felt that the family was no closer to reunification than when the children came into care. Respondent mother's failure to consistently obtain treatment in the past, and her continued impairment even with treatment, supply adequate basis for the conclusion that there was no reasonable likelihood that her mental health issues would be rectified within a reasonable time considering the ages of the children. Even crediting respondent mother's testimony at trial that she had finally obtained housing (which she never submitted for inspection however), her ability to maintain such housing is very questionable in light of her lack of employment throughout these proceedings. Finally, the fact that respondent mother's anger management problem continued to exist after she completed domestic violence counseling, evidenced by her use of a hammer at the door of respondent father, also supplies a basis for the conclusion that the domestic violence issue would not be rectified within a reasonable time considering the ages of the children. Therefore, the trial court did not clearly err by terminating both respondents' parental rights pursuant to MCL 712A.19b(3)(c)(i).

The same evidence that established that the conditions of adjudication concerning respondent mother continued to exist and were unlikely to be rectified within a reasonable time equally supports the trial court's finding that she failed to provide proper care and custody for the children and there was no reasonable likelihood that she would be able to do so within a reasonable time considering the ages of the children, MCL 712A.19b(3)(g),² and that there was a reasonable likelihood that the children would be harmed if returned to her care, MCL 712A.19b(3)(j). Respondent mother failed to provide proper care and custody for the minor children by maintaining the home in deplorable condition. The testimony further indicated that respondent mother did not benefit from parenting classes. Her visits with the children were often chaotic and she gave very little redirection, but would ignore or laugh at their behaviors. She was not receptive to suggestions from the foster care worker and would ignore her or walk away. Respondent mother's failure to comply with the parent agency agreement, notably her failure to obtain employment or demonstrate suitable housing, supply additional evidence of her inability to provide proper care and custody for the children. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003).

The trial court also did not clearly err by finding that the children would be harmed if returned to respondent father. MCL 712A.19b(3)(j). We have already noted evidence that respondent father did not maintain a home in suitable condition for the two young children and continued to exhibit explosive episodes throughout this matter. In addition, although he

² This statutory subsection was applied only to respondent mother.

indicated his intention to plan separately from respondent mother, he did not put forth any day care plan for the children, and failed to provide the social worker with utility bills and a budget despite many requests.³ Overall, the evidence simply fails to demonstrate an ability on the part of respondent father to provide the children with stable, adequate care. We are left with no clear impression that the trial court made a mistake by finding that there was a reasonable likelihood that the children would be harmed if returned to him. *In re Terry*, 240 Mich App 14, 22; 610 NW2d 563 (2000).

In the context of his argument concerning the sufficiency of the evidence, respondent father contends, citing MRE 614(a), that he was denied due process by the trial court's refusal to allow him to cross-examine Helen Bury (the children's caretaker and respondent father's sister), a witness called by the court. Ms. Bury testified briefly that she was afraid of respondent father. Respondent father's attorney sought to show motive on Ms. Bury's part by inquiring whether she wished to adopt the children. According to MRE 614(a), all parties are entitled to cross-examine a witness called by the court. However, the rules of evidence are not applicable to child protective proceedings unless specifically provided, MCR 3.901(3), and they are expressly inapplicable to termination proceedings, except those taking place at an initial disposition or based upon circumstances different from those that led to the taking of jurisdiction. MCR 3.977(E)(3), (F)(1), (G)(2).⁴ Moreover, it is not clear that the denial of cross-examination in this instance constituted a denial of due process. "Although due process often requires confrontation and cross-examination, these are not absolute requirements." *In re Brock*, 442 Mich 101, 109; 499 NW2d 752 (1993).⁵ In child protective proceedings, the court has applied the balancing test set forth in *Mathews v Eldridge*, 424 US 319; 96 S Ct 893; 47 L Ed2d 18 (1976), to test the constitutional sufficiency of a given procedure. *In re Brock*, *supra* at 111; *In re AMB*, 248 Mich App 144, 209; 640 NW2d 262 (2001).

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews*, *supra* at 335.]

³ In May 2005, his income was approximately \$700 to \$750 per month, and his rent was \$450 per month. The worker remained uncertain that his income was adequate.

⁴ The trial court did rely upon MCL 712A.19b(3)(c)(ii) for the termination of respondent father's parental rights, but we conclude that ground was not adequately supported by the evidence, and do not rely upon it as a ground for affirmance. Therefore, although the rules of evidence were applicable for this statutory subsection, MCR 3.977(F)(1), we need not analyze any error that might have occurred in disregarding them.

⁵ The confrontation clause of the Sixth Amendment does not apply to child protective proceedings. *In re Brock*, *supra* at 108.

There is no question that the interest in caring for one's child is a compelling one; it is clearly a liberty interest that is affected by child protective proceedings. *In re Brock, supra* at 109; *In re AMB, supra* at 209. It appears, however, that the risk to respondent father of an erroneous deprivation was not significantly increased by his inability to cross-examine Helen Bury. Even if respondent had been able to challenge the credibility of Ms. Bury by showing interest or motive, her testimony, that she was afraid of respondent, would suffer little from this type of attack. The trial court referred to Ms. Bury's testimony several times in its findings of fact. The gist of the court's comments was that respondent lacked a support system due to his poor relationship with his sister, the caretaker of the children. A showing of motive or bias on the sister's part would tend to reinforce rather than negate the trial court's conclusion that the relationship was not supportive. Thus it is unlikely that the likelihood of an erroneous deprivation was increased by the lack of cross-examination. Finally, it appears that minimal burden would have been imposed on the trial court by allowing cross-examination of Ms. Bury, and considering the import of these proceedings, it certainly would have been preferable to do so. Balancing all three factors, however, we are not convinced that the denial of cross-examination constituted a denial of due process. Ms. Bury's testimony was brief, and essentially duplicative of other record evidence that there was a confrontation between respondent father and his sister that placed her in fear of him. This claim of error warrants no relief on appeal.

Finally, the trial court did not clearly err by finding that termination was not clearly contrary to the best interests of the children. MCL 712A.19b(5). Both of the young children, ages five and seven at the time of termination, had been in care for over two years. In considering the best interests of the children, we note that they have demonstrated troubling behaviors associated with their visits with respondents, and those behaviors stopped when visits were stopped. Given that both parents appear to lack the ability to provide adequate care for the children, and considering the lengthy time that they have been out of the care of the parents, we conclude that the trial court did not clearly err by finding that termination of respondents' parental rights was not clearly contrary to the best interests of the children.

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray